68 FLRA No. 156

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5064

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DECISION

September 29, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator James W. Mastriani found that the Agency violated 5 U.S.C. § 6101 and 5 C.F.R. § 610.121, which mirrors § 6101's requirements, when the Agency failed to provide sufficient justification to support deviating from § 6101's scheduling requirements. Section 6101 requires, in pertinent part, a standardized forty-hour workweek for all executive-agency employees absent an agency head's reasonable determination that doing so would result in seriously handicapping the agency's functions or substantially increasing costs.[1]

The Arbitrator concluded that the Agency head's determination at issue (the Basham Memo) allowed managers to deviate from the requirements of § 6101 in setting the schedules of its custom officers and agriculture specialists (unit employees) in qualifying circumstances. However, contrary to the Agency's argument, the Arbitrator also concluded that the Basham Memo did not provide a blanket exception to § 6101's requirements without further Agency consideration of the circumstances of scheduling deviations. As a remedy, the Arbitrator ordered the Agency to: (1) cease and desist from further scheduling deviations without sufficient documentary evidence; (2) to provide the Union, within sixty days of the award, with all unit-employee-work schedules, for the period covered by the grievance, that deviated from § 6101's scheduling requirements; and (3) to pay backpay to all unit employees affected by unsupported scheduling deviations during the applicable recovery period. The case presents the Authority with nine substantive questions.

The first question is whether the award is based on nonfacts. The Agency's nonfact arguments either challenge the Arbitrator's legal conclusions, concern matters that were disputed below, or fail to identify a clearly erroneous central fact underlying the award, but for which the Arbitrator would have reached a different result. Because none of the Agency's arguments provide a basis for finding the award deficient on nonfact grounds, the answer to the first question is no.

The second question is whether the award is contrary to § 6101 because the Arbitrator found that the Basham Memo did not provide a blanket exception, applicable to all unit employees, from § 6101's scheduling requirements. Because the Arbitrator's finding is not contrary to § 6101, the answer is no.

The third question is whether the award is contrary to law because it requires the Agency to establish and maintain an "evidentiary nexus"[2] to support its "reasoned determination"[3] that a scheduling deviation is authorized. Because the Arbitrator's finding is not contrary to law, rule, or regulation, the answer is no.

The fourth and fifth questions are whether the award is contrary to law because it requires the Agency to: (1) provide its "evidentiary nexus" to the Union each time it seeks to deviate from § 6101, so that the Union can "evaluate whether a scheduling deviation has been properly authorized";[4] and (2) "specifically invoke the Basham [Memo]" [5] when making scheduling deviations. Because § 2425.6(e)(1) of the Authority's Regulations requires an excepting party to support each of its exceptions,[6] and the Agency fails to support both of these exceptions, the answer is no.

The sixth question is whether the award is contrary to the Back Pay Act (BPA)[7] insofar as it requires the parties to utilize formulae set forth by a different arbitrator (the Meredith award) in a similar matter between these same parties. Because the Authority previously ruled that the formulae contained in the

[1] *See* 5 U.S.C. § 6101; *U.S. DHS, U.S. CBP*, 65 FLRA 978, 983 (2011) (*DHS I*) (citing *Gahagan v. U.S.*, 19 Cl. Ct. 168, 179 (1989) (*Gahagan*)).

[2] Exceptions Br. at 19 (quoting Award at 72, 74).
[3] *Id.* at 9 (quoting Award at 72).
[4] Award at 70 (internal quotation marks omitted).
[5] Exceptions Br. at 19.
[6] 5 C.F.R. § 2425.6(e)(1).
[7] 5 U.S.C. § 5596.

Meredith award are not contrary to the BPA,[8] and the Agency has not provided additional support to find the award at issue here contrary to the BPA, the answer is no.

The seventh question is whether the award is contrary to the Customs Officer Pay Reform Act (COPRA)[9] and the Antideficiency Act (ADA)[10] because it compensates unit employees for work that was not actually assigned or performed on Sundays, holidays, or at night, and violates the ADA because it compensates unit employees in excess of the COPRA's statutory cap on overtime earnings. Because the COPRA and the ADA do not prohibit an award of backpay for work not actually assigned or performed on Sundays, holidays, or at night, and the COPRA's earnings cap does not apply here, the answer is no.

The eighth question is whether the award's remedy is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Because the formulae for awarding backpay are clear from the award as a whole, and the Agency fails to support its argument, the answer is no.

The ninth and final question is whether the award's remedy is contrary to public policy inasmuch as it is allegedly a punitive award directed towards the federal government. Because the award complies with the BPA, and BPA-compliant awards are not punitive towards the federal government, the answer is no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated 5 U.S.C. § 6101(a), 5 C.F.R. § 610.121(a), and Article 34, Section 5 of the parties' agreement, when it improperly scheduled unit employees without ensuring that the schedules included: (1) consistent start and stop times for each regular workday in a basic workweek; and (2) two consecutive days off outside the basic workweek. In its grievance response, the Agency contended that the challenged schedules were consistent with applicable law and regulation because, in accordance with § 6101, the Basham Memo – which "included a reasoned determination that the Agency would be seriously handicapped and/or costs would be substantially increased unless exceptions to the . . . § 6101(a)(3) scheduling requirements were made" – removed the unit employees from § 6101's scheduling requirements.[11] As discussed previously, § 6101 requires, in pertinent part, a standardized forty-hour workweek for all executive-agency employees absent an agency head's reasonable determination that doing so would result in seriously handicapping the agency's functions or substantially increasing costs.[12]

The grievance was unresolved, and the parties submitted it to arbitration. At arbitration, the Arbitrator framed the issue as whether the Agency violated § 6101 and § 610.121 in establishing the challenged schedules, and, if so, what would be an appropriate remedy.

Regarding the scope of the grievance, the Arbitrator reviewed previous arbitration awards and Authority precedent involving the same parties and similar challenges to § 6101's scheduling requirements.[13] The Arbitrator sought to avoid any overlap with the scope of those prior awards and limited "the scope of the grievance [to include] all employees employed on August 1, 2011[,] who were subject to the Agency's application of the April 17, 2008[,] Basham Memo."[14]

Regarding the grievance's legal framework, the Arbitrator found that § 6101 requires, as relevant here, that the Agency provide its employees with work schedules that include the same working hours in each regular workday and two consecutive days off outside the basic workweek (the scheduling requirements). But he also found that the Agency could except itself from the scheduling requirements if the Agency head "determines that his organization would be seriously handicapped in carrying out its function," or "that costs would be substantially increased."[15]

At arbitration, the Agency argued that it did not violate § 6101's scheduling requirements because the Basham Memo excepted the Agency from those requirements. Specifically, the Agency argued that "Commissioner Basham made a correct determination that adherence to the scheduling statute would seriously handicap the Agency and/or that its costs would substantially increase."[16] And, therefore, the Agency claimed that it "properly relied on the exceptions provided in § 6101[] when scheduling employees."[17]

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[8] *U.S. DHS, U.S. CBP*, 68 FLRA 253, 257 (2015) (*DHS III*), *recons. denied*, 68 FLRA 829 (2015); *see U.S. DHS, U.S. CBP*, 68 FLRA 524, 527-29 (2015) (*DHS IV*).
[9] 19 U.S.C. § 267.
[10] 31 U.S.C. § 1341.
[11] Award at 16 (quoting Agency's Grievance Response).
[12] *See* 5 U.S.C. § 6101; *U.S. DHS I*, 65 FLRA at 983 (citing *Gahagan*, 19 Cl. Ct. at 179).
[13] Award at 59-60; *see DHS IV*, 68 FLRA at 524; *DHS III*, 68 FLRA at 253; *U.S. DHS, U.S. CBP*, 68 FLRA 157, 157 (2015) (*DHS II*) (Member Pizzella dissenting); *recons. denied*, 68 FLRA 157 (2015) (Member Pizzella dissenting); *DHS I*, 65 FLRA at 978.
[14] Award at 60.
[15] *Id.* at 17 (quoting 5 U.S.C. § 6101) (internal citations omitted).
[16] *Id.* at 47.
[17] *Id.*

As pertinent here, the Union argued at arbitration that the "Basham Memo[] cannot justify the Agency's failure to schedule employees in accordance with law," that the "Basham Memo[] directly contravenes [§ 6101,] and that the exceptions in law are not broad enough to justify the memo[]'s flexibility argument []or to reflect that the terms of the memo constitute a reasoned determination."[18] Further, the Union argued that "even though the Agency has acknowledged that the Basham Memo[] requires [the Agency] to document non-compliant scheduling practices, no evidence of such documentation has been provided to justify the non-complaint schedules."[19]

Regarding whether the Basham Memo excepted the Agency from § 6101's scheduling requirements, the Arbitrator determined that the Basham Memo "cannot serve as a cloak to be applied uniformly without any supporting justification other than the presentation of its terms."[20] Specifically, he found that, "[w]hile the terms of the Basham Memo[] represent a general grant of authority from the Agency head to except employees from § 6101(a)(3), the Agency must still show that a scheduling deviation is consistent with its authority and has been properly rooted in the power delegated to its managers and designees."[21]

Regarding the delegation of authority "to managers and designees"[22] to make scheduling deviations under § 6101, the Arbitrator found that an Agency-wide directive to managers – instructing them how to make § 6101-scheduling deviations (referencing the Basham Memo) – made it clear that managers had an obligation to retain sufficient documentary records to support deviating from § 6101's scheduling requirements. Applying this requirement, the Arbitrator concluded that the Agency failed "to provide sufficient justification through documentation, records[,] or other credible evidence to support individual scheduling deviations," and, therefore, the "Agency did not meet the reasoned determination standard in the manner in which it applied the Basham Memo[] to its scheduling practices between the date of its promulgation and the date of the grievance. This constitutes a violation of . . . § 6101 and . . . § 610.121."[23]

Regarding the remedy, it had three parts. First, the Arbitrator ordered "the Agency to cease and desist from changing established work schedules by the claimed exercise of Basham[-]Memo[] authority without generating and retaining sufficient documentary records or other forms of credible evidence that, upon review, can identify the basis for scheduling exceptions to . . . § 6101."[24] Second, he ordered the Agency to provide the Union, within sixty days, with all unit-employee-work "schedules [within the period covered by the grievance] that do not provide the same start and stop times during the basic workweek and/or do not provide two consecutive days off outside the basic workweek."[25] And third, he ordered the Agency to pay unit employees – whose schedules violated § 6101 and § 610.121 – backpay "for reductions in pay, allowances and/or differentials consistent with the remedies set forth in the [Meredith award]."[26]

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters

A. The Agency's exceptions to the award are timely.

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."[27] If an award is served by commercial delivery, the date of service is the date on which the award is deposited with the commercial delivery service, and the excepting party receives an additional five days for filing its exceptions.[28] However, if an award is served by email, the date of service is the date of transmission, and the excepting party does not receive an additional five days.[29] Additionally, if the parties have not reached an agreement regarding the method of service, the arbitrator may use any commonly used method – including, but not limited to, email, fax, regular mail, commercial delivery, and personal delivery – and the arbitrator's *selected method* is controlling for purposes of calculating the time limit for filing exceptions.[30]

The Arbitrator served his award on the parties via email *and* commercial delivery. In his award e-mail dated July 16, 2014, the Arbitrator stated that "[t]his transmission is not official service. Official service shall be by overnight [FedEx]."[31] Subsequently, the Agency filed its exceptions to the award on August 18, 2014, thirty-three days after the Arbitrator's email, and the Union filed an opposition to the Agency's exceptions, asserting that the Agency's exceptions are untimely under § 2425.2(c) of the Authority's regulations[32] because "the

[18] *Id.* at 44 (internal citations omitted).
[19] *Id.* at 45-46.
[20] *Id.* at 70.
[21] *Id.* at 70-71.
[22] *Id.*
[23] *Id.* at 72 (internal quotations omitted).
[24] *Id.* at 73-74.
[25] *Id.* at 76.
[26] *Id.*
[27] 5 C.F.R. § 2425.2(b); *see also* 5 U.S.C. § 7122(b).
[28] 5 C.F.R. § 2425.2(c)(2).
[29] *Id.* § 2425.2(c)(3).
[30] *Id.* § 2425.2(c).
[31] Opp'n, Ex. C at 1; Response, Ex. 1 at 1.
[32] 5 C.F.R. § 2425.2(c)

[email] was [the] service of the award, regardless of the Arbitrator's statements."[33]

The Authority issued an order directing the Agency to show cause why the Authority should not dismiss its exceptions as untimely.[34] The Agency filed a timely response, in which it argued that, because the parties did not agree to a specific method of service, the Arbitrator's selected method of service is controlling.[35] The Agency contends that, because the Arbitrator "clearly and unequivocally elected and intended [FedEx] as the method of official service" of the award, the Agency is entitled to an additional five days to file its exceptions.[36] Accordingly, the Agency argues that its exceptions were due on or before August 20, 2014, and are therefore timely.[37]

We agree with the Agency. Although 5 C.F.R. § 2425.2(c)(5) provides that an excepting party will not receive an additional five days for filing when an award is served by email and commercial delivery on the same day, § 2425.2(c)(5) is prefaced by the following wording: "[t]he following rules . . . assume that the [methods] of service discussed are either consistent with the parties' agreement or *chosen* by the arbitrator absent such an agreement."[38] And, in promulgating the regulations, the Authority stated that "the Authority purposely drafted the proposed rule to leave to the parties (or, absent agreement by the parties, to the arbitrator) decisions regarding how arbitration awards will be served."[39] Therefore, the Authority's regulations leave it to the arbitrator – absent the parties' agreement to the contrary – to determine what is the official method of service. Section 2425.3(c)(5)'s "first-method-of-service" rule only applies when the arbitrator has not made such a determination. Accordingly, we find the Agency's exceptions timely.

B. The Agency's and Union's supplemental submissions are not properly before us.

The Agency filed a supplemental submission responding to the timeliness issue raised in the Union's opposition to the Agency's exceptions, and the Union filed a reply to the Agency's supplemental submission. Neither the Agency nor the Union requested leave under § 2429.26 of the Authority's Regulations to file these supplemental submissions. We acknowledge that Authority precedent previously held that, even when a party does not request leave to file a supplemental submission, the Authority will consider such a submission if it addressed the timeliness of arbitration exceptions.[40] However, that holding was based on the view that the timeliness of arbitration exceptions raises a *jurisdictional* issue,[41] a view that the Authority reversed in *U.S. Department of VA, Medical Center, Richmond, Virginia.*[42] Therefore, because the issue of the timeliness of exceptions is not a jurisdictional issue, and the Authority will ordinarily not consider supplemental submissions absent a request for leave to file, we will not consider both parties' supplemental submissions.

The Union also filed a motion to strike the Agency's response to the Authority's show-cause order. The Union argued that, because the Agency failed to request leave under § 2429.26 to file its response to the Authority's order, the response must be stricken.[43] However, the Authority's order explicitly instructed the Agency to file a response.[44] Consequently, the Agency was not required to seek leave under § 2429.26 before complying with the Authority's directive. Accordingly, we deny the Union's motion to strike.

Last, the Union filed a motion for leave to file a reply to the Agency's supplemental submission. As stated above, we will not consider the Agency's supplemental submission because the Agency failed to request leave under § 2429.26. As the Agency's supplemental submission is thus not before us, the Union's request to reply to this supplemental submission is moot.[45] Therefore, we deny the Union's motion for leave.

[33] Opp'n at 7.
[34] Order to Show Cause (Order) at 3.
[35] Agency's Response to Order (Response) at 2 (citing 5 C.F.R. § 2425.2(c); *SSA Headquarters, Woodlawn, Md.*, 63 FLRA 302, 303 (2009)).
[36] *Id.* at 4.
[37] *Id.*
[38] 5 C.F.R. § 2425.2(c) (emphasis added).
[39] 75 Fed. Reg. 42,283 (July 21, 2010).
[40] *IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 187 (2010).
[41] *Id.*
[42] 68 FLRA 231, 233 (2015).
[43] Union's Mot. to Strike Response at 2.
[44] Order at 3.
[45] *See U.S. Dep't of VA, Med. Ctr. Marion, Ill.*, 60 FLRA 971, 971 n.1 (2005).

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on several nonfacts.[46] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[47] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of a factual matter that the parties disputed at arbitration.[48] And challenges to an arbitrator's legal conclusion do not provide a basis for finding an award deficient as based on nonfacts.[49]

The Agency asserts that the award is based on nonfacts because, contrary to the Arbitrator's findings, § 6101 does not: (1) have an "implied limitation on the broad authority vested in the Agency head";[50] (2) require an agency to "establish a nexus between the assignment of employees to scheduling deviations and [§ 6101's] standards";[51] (3) require the Agency to "specifically invoke the 'Basham [Memo]' by name";[52] and (4) require the Agency to provide its "evidentiary nexus" to the Union when seeking a scheduling deviation.[53] As these nonfact arguments challenge legal conclusions, they provide no basis for finding the award deficient on nonfact grounds.

The Agency also argues that the award is based on nonfacts because, contrary to the Arbitrator's finding, the Agency did not create – let alone rely on – a third § 6101 exception authorizing scheduling deviations when "flexibility is essential to meet conditions over which [the Agency] has no control."[54] Specifically, the Agency asserts that the "third exception" to § 6101's scheduling requirements is not an Agency-created exception but "an example of the application of how the lack of flexibility in scheduling may result in substantial increases in costs as well as impact the Agency's ability to carry out its functions and meet its mission," (both exceptions under § 6101(a)(3)).[55] However, the record indicates that this factual matter was disputed at length before the Arbitrator. For instance, the Union argued at arbitration that the Agency improperly issued a directive to managers allowing "flexibility" as a third exception when using the Basham Memo.[56] Additionally, an Acting Commissioner testified at arbitration that the Basham Memo authorized "deviation from the requirements in [§] 6101 . . . under the need for *flexibility* and operational demands."[57] Consequently, as this factual matter was disputed before the Arbitrator, the Agency's argument provides no basis for finding the award deficient as based on a nonfact.

Lastly, the Agency incorporates its nonfact exceptions that challenged the Meredith award in *U.S. DHS, U.S. CBP* (*DHS III*),[58] which was pending before the Authority when the Agency filed its exceptions.[59] Here, as in *DHS III*, the Agency identically asserts that the Meredith award incorrectly assumes that: (1) "every employee with a scheduling deviation had been deprived of overtime[,] which they otherwise would have earned";[60] (2) "the Union's formula[e] will not provide employees with payments in excess of their losses";[61] (3) "the Agency did not specify how a loss would be calculated . . . , or what the remedy would be for those losses, or what the process would be for resolving differences";[62] and (4) "the five[-]year period of time between the [previous arbitrator]'s 2008 decision and possible implementation of the award was unreasonable."[63]

In *DHS III*, the Authority determined that each of the four identical nonfact arguments above did not provide a basis for finding the Meredith award deficient.[64] As the Agency does not provide any additional support beyond adopting *DHS III*'s four nonfact exceptions to the Meredith award, the Agency has failed to identify a clearly erroneous central fact underlying the award at issue here, but for which the Arbitrator would have reached a different result.

Therefore, we deny the Agency's nonfact exceptions.

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[46] Exceptions Br. at 4-5, 9-10, 19-21, 31-32, 34-35.
[47] *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012).
[48] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993).
[49] *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000)).
[50] Exceptions Br. at 16-17 (quoting Award at 69-70, 72) (internal quotation marks omitted).
[51] *Id.* at 10 (quoting Award at 64) (internal quotation marks omitted).
[52] *Id.* at 19 (internal quotation marks omitted).
[53] *Id.* (internal quotation marks omitted).
[54] *Id.* at 20 (quoting Award at 33) (internal quotation marks omitted).
[55] *Id.* at 21.
[56] *Id.* at 45.
[57] *Id.* at 29 (second alternation in original) (emphasis added).
[58] *DHS III*, 68 FLRA at 253.
[59] Exceptions Br. at 31-32.
[60] *Id.* at 31; *DHS III*, 68 FLRA at 259 (alteration in original) (internal quotation marks omitted).
[61] Exceptions Br. at 31; *see also DHS III*, 68 FLRA at 259.
[62] Exceptions Br. at 31-32; *see also DHS III*, 68 FLRA at 259.
[63] Exceptions Br. at 32; *see also DHS III*, 68 FLRA at 259 (alterations in original) (internal quotation marks omitted).
[64] *DHS III*, 68 FLRA at 259.

B. The award is not contrary to law.

The Agency argues that the award is contrary to law.[65] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[66] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[67] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[68]

1. The Basham Memo does not provide a blanket exception rendering § 6101 and § 610.121(a)'s scheduling requirements inapplicable to unit employees.

In its first contrary-to-law exception, the Agency argues that the Arbitrator's award is contrary to § 6101 because he erroneously found that unit employees were not exempt from § 6101's scheduling requirements.[69] Specifically, the Agency submits that the Basham Memo lawfully excepts unit employees from § 6101's scheduling requirements because it "contains an exhaustive discussion of the nature of the work performed by [Agency employees]," and finds that "rigid adherence to . . . [§] 6101 . . . seriously handicap[s] the Agency or substantially increase[s] its costs."[70]

As relevant here, and as discussed previously, § 6101 provides that "[e]xcept when the head of an [e]xecutive agency . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide" a standardized forty-hour workweek.[71] In order to qualify for this exception, an agency head must make a determination that "an exception from the normal scheduling was justified, in view of agency functions and the costs involved."[72] An agency head makes a determination that the agency would be "seriously handicapped" or that "costs would be substantially increased" when the agency head justifies the need for an exception with a "discussion of the nature of work performed" by the employees and "the inherent administrative difficulties in scheduling their hours of duty."[73] Although not requiring "exhaustive findings," such a determination must be "reasoned."[74] A "serious handicap" is one that "would jeopardize an agency's entire mission and demand priority attention throughout the organization."[75] Moreover, an agency head fails to make such a determination simply by instructing in a policy that schedulers will prepare workweek schedules to improve efficiency.[76]

In determining the Basham Memo's applicability to the grievance, the Arbitrator applied a three-step analysis. First, the Arbitrator determined – and the Agency does not challenge – that § 6101 and § 610.121's scheduling requirements applied to the unit employees absent the lawful use of § 6101's exception.[77] Second, the Arbitrator concluded that the "Agency's adoption of the Basham Memo[] is an exercise of lawful authority that *allows for* reasoned determinations to be made[, and that i]ts promulgation does not violate . . . § 6101 and . . . § 610.121."[78] And third, the Arbitrator found that the Basham Memo – in conjunction with its implementing directive[79] – did not provide a blanket "reasoned determination" applicable to all unit employees.[80] Rather, the Arbitrator concluded that the Basham Memo and its implementing directive authorized Agency managers to make reasoned determinations in applying § 6101's exception on a case-by-case basis.[81]

The Agency's contention that the Basham Memo alone excepts unit employees from § 6101 and § 610.121's scheduling requirements is without merit for two reasons. First, although the Agency asserts that the Basham Memo "*formally* exempted [unit employees] from [§ 6101's] requirements,"[82] the Agency does not point to any specific language in the Basham Memo, nor any additional evidence, that indicates that then-Commissioner Basham had excepted all unit employees from § 6101's scheduling requirements without requiring further Agency action. Contrary to the Agency's broad interpretation, the Basham Memo provides, and the Arbitrator correctly found,[83] that only "in cases" where the Agency would be seriously

[65] Exceptions Br. at 10-30.
[66] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[67] *See U.S. DOD, Dep't's of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[68] *Id.* (citations omitted).
[69] Exceptions Br. at 9-16.
[70] *Id.* at 14.
[71] 5 U.S.C. § 6101 (a)(3).
[72] *DHS I*, 65 FLRA at 983 (quoting *Acuna v. U.S.*, 479 F.2d 1356, 1362 (Ct. Cl. 1973) (*Acuna*)) (internal quotation marks omitted).
[73] *Id.* (internal quotation marks omitted).
[74] *Id.* (quoting *Gahagan*, 19 Cl. Ct. at 179) (internal quotation marks omitted).
[75] *Id.* (internal quotation marks omitted).
[76] *Id.* (citing *Gahagan*, 19 Cl. Ct. at 178-79).
[77] Award at 64.
[78] *Id.* at 71 (emphasis added).
[79] *Id.* at 64-67.
[80] *Id.* at 70 (internal quotation marks omitted).
[81] *Id.* at 70-73.
[82] Exceptions Br. at 6 (emphasis added).
[83] Award at 63-64.

handicapped or costs would be substantially increased could the Agency except unit employees from § 6101's scheduling requirements.[84] Supporting this narrower interpretation, the record reflects that less than two months after promulgating the Basham Memo, the Agency issued a directive to managers of unit employees, explaining how to apply the Basham Memo. In the directive, the Agency instructs that:

> (1) "[t]he scheduling of [unit] employees should, to the extent consistent with the accomplishment of the Agency's mission, be made in accordance with . . . § 6101";[85]
>
> (2) "[t]he Commissioner has . . . determined that under *certain circumstances* . . . the work schedules of [unit employees] *may* be established without applying . . . § 6101";[86] and
>
> (3) "[i]n all situations in which [Agency] managers must apply an exception in accordance with the [Basham Memo], . . . managers *must retain sufficient documentary records to support* the exception to . . . § 6101 . . . for a minimum of six [] years."[87]

The directive makes clear that scheduling deviations must only occur in qualifying circumstances, and that managers must maintain sufficient documentary records to support the use of the Basham-Memo exception in particular instances.[88] Thus, the language of the Basham Memo and the Agency's directive support the Arbitrator's conclusion that the Agency delegated to managers the authority to make the "reasoned determination" to deviate from § 6101's scheduling requirements regarding particular unit-employee work schedules.[89]

Second, the Agency's reliance on two cases, *Acuna v. United States* (*Acuna*)[90] and *U.S. Department of VA, Consolidated Mail Outpatient Pharmacy, Leavenworth, Kansas* (*VA*),[91] is misplaced because *Acuna* and *VA* are distinguishable.

In *Acuna*, the court determined that an agency head lawfully exempted certain Immigration and Naturalization Service (INS) employees from § 6101's scheduling requirements.[92] The Agency argues that, like *Acuna*, then-Commissioner Basham undertook "an exhaustive discussion of the nature of the work performed by [unit employees] . . . and how rigid adherence to the provisions of [§] 6101 [would] seriously handicap the Agency or substantially increase its costs."[93] However, *Acuna* is distinguishable because the INS, unlike the Agency here, did not promulgate a clarifying directive delegating authority to managers to make, and requiring them to support, their reasoned determination for deviations from § 6101's scheduling requirements. Although the agency head in *Acuna* may have provided a blanket § 6101 exception, the facts of this case do not support the same conclusion.

Similarly, the Agency's reliance on *VA* is misplaced. The Agency relies on *VA*, an unfair-labor-practice case, for the proposition that once authority to deviate from § 6101 has been lawfully executed, the agency is no longer required to reassess each deviated schedule.[94] However, *VA* does not stand for this broad proposition because the respondent agency in *VA*, unlike here, sought to deviate from § 6101's scheduling requirements to address a particular mission-critical situation.[95] Specifically, the respondent agency wanted to implement a six-day workweek schedule because its veteran client population had increased from 2.6 million to 6 million, resulting in a twenty-eight-percent increase in prescription workload. Further, the respondent-agency found that optional overtime-weekend work resulted in an increase in prescription errors and employee sick-leave usage.[96] The Authority in *VA* considered these circumstances, and found that they supported the agency's scheduling deviations.[97] Here, the Agency does not reference any change in mission circumstances, or provide additional authority to support its position that the Basham Memo provided a blanket exception to § 6101's scheduling requirements. Therefore, we find the Agency's arguments without merit.

Consequently, because the Agency did not make a reasoned determination in order to justify excepting unit employees from § 6101's scheduling requirements, the Agency has not demonstrated that the award is deficient for failing to find that the Agency made such a determination.[98] Accordingly, we deny the Agency's first contrary-to-law exception.

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[84] *Id.* at 35 (quoting Basham Memo).
[85] *Id.* at 65.
[86] *Id.* at 66 (emphasis added).
[87] *Id.* at 66 (emphasis added).
[88] *Id.* at 65-67.
[89] *Id.* at 69-71.
[90] 479 F.2d at 1356.
[91] 60 FLRA 844 (2005) (then-Member Pope dissenting).
[92] *Acuna*, 479 F.2d at 1364.
[93] Exceptions Br. at 14.
[94] *Id.*
[95] *VA*, 60 FLRA at 851.
[96] *Id.*
[97] *Id.*
[98] *See DHS I*, 65 FLRA at 984; *U.S. Dep't of the Navy, Phila. Naval Shipyard*, 39 FLRA 590, 604-05 (upholding the arbitrator's determination that the agency did not meet the

2. The Arbitrator's finding that the Agency must establish an evidentiary nexus to deviate from § 6101's scheduling requirements is not contrary to law.

In its second contrary-to-law exception, the Agency argues that the award is contrary to law because it requires the Agency to establish and maintain a record of an "evidentiary nexus"[99] to support its "reasoned determination" that § 6101 authorizes a scheduling deviation.[100]

As discussed above, § 6101 contains an exception to compliance with its scheduling requirements when the head of an agency "determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased."[101] And in order to qualify for this exception, the agency head must make a reasoned determination based on a "discussion of the nature of work performed" by the employees and "the inherent administrative difficulties in scheduling their hours of duty."[102]

The Agency's second contrary-to-law exception is without merit. As a first step, the Arbitrator found that the Basham Memo "is consistent with what the courts have previously deemed sufficient to allow [the Agency] to apply the [§ 6101] exception[] in certain circumstances," and that the Basham Memo allows "the Agency to make the reasoned determination that established case law has required."[103] Finding the Basham Memo consistent with law, the Arbitrator then found that the Basham Memo and its accompanying directive "must be read to require the Agency to establish a nexus between the assignment of employees to scheduling deviations and the standards stated in . . . § 6101."[104] Plainly worded, the Arbitrator found that the Basham Memo and the Agency directive created the vehicle that managers could use to authorize scheduling deviations *if* circumstances warranted its use.

The record and case precedent support the Arbitrator's interpretation. Although the Agency argues that the Basham Memo constitutes a reasoned determination, the Basham Memo and its implementing directive demonstrate otherwise. Specifically, the Basham Memo by itself does not implicitly or explicitly make clear that its purpose is to provide a blanket exception removing unit employees from § 6101's scheduling requirements. To the contrary, the Agency's directive outlining how to apply the Basham Memo makes clear that managers are to: (1) ordinarily apply § 6101's scheduling requirements; (2) deviate from § 6101's scheduling requirements only in specifically defined circumstances; and (3) retain sufficient documentary records to support deviating from § 6101's scheduling requirements.[105] In clarifying the Basham Memo's parameters, the Agency's directive requires its managers to make the reasoned determination – i.e., to consider mission circumstances and determine whether the Basham Memo's exception is appropriate – and to maintain supporting records – i.e., the "evidentiary nexus" – of any scheduling deviations. Therefore, the Arbitrator correctly found that the Basham Memo requires additional consideration of specific circumstances, beyond the Memo's own terms. Consequently, we reject the Agency's argument that the Basham Memo provides a blanket reasoned determination to except all unit employees from § 6101's scheduling requirements.

Accordingly, we deny the Agency's second contrary-to-law exception.

3. The Agency fails to support its third and fourth contrary-to-law exceptions.

The Agency's third and fourth contrary-to-law exceptions state that the award is contrary to law because it requires the Agency to: (1) provide its "evidentiary nexus" to the Union each time it seeks to deviate from § 6101 so that the Union can "evaluate whether a scheduling deviation has been properly authorized";[106] and (2) "specifically invoke the Basham [Memo]" when making scheduling deviations.[107] Section 2425.6(e)(1) of the Authority's Regulations provides, in relevant part, that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to support . . . a ground" listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[108] In its third and fourth contrary-to-law exceptions, the Agency does not cite to any relevant law, rule, or regulation, and does not provide any arguments in support of its contrary-to-law claims. Therefore, we deny these exceptions under § 2425.6(e)(1) of the Authority's Regulations.[109]

requirements of § 6101(a)(3) and regulations when it modified unit-employee schedules).

[99] Exceptions Br. at 19.

[100] *Id*. at 16.

[101] 5 U.S.C. § 6101(a)(3).

[102] *DHS I*, 65 FLRA at 983 (quoting *Acuna*, 479 F.2d at 1362) (internal quotation marks omitted).

[103] Award at 63-64 (citing Arbitrator's earlier discussion of *Acuna* and *Gahagan*) (internal quotation marks omitted).

[104] *Id.* at 64.

[105] *Id.* at 65-66 (quoting the Basham Memo).

[106] Exceptions Br. at 19.

[107] *Id.* (internal quotation marks omitted).

[108] 5 C.F.R. § 2425.6(e)(1).

[109] *E.g.*, *AFGE, Local 31*, 67 FLRA 333, 334 (2014).

4. The award is not contrary to the BPA.

The Agency's fifth contrary-to-law exception argues that the award is contrary to the BPA insofar as it requires the parties to utilize formulae set forth by the Meredith award in *DHS III* – a case involving similar matters between these same parties.

In *DHS III*[110] and *U.S. DHS, U.S. CBP* (*DHS IV*),[111] the Authority found that the formulae set forth in the Meredith award do not violate the BPA when an arbitrator has determined that an agency's unwarranted and unjustified personnel actions resulted in a loss to unit employees. In *DHS III*, and reaffirmed in *DHS IV*,[112] the Authority held that using formulae to compute economic losses is permissible so long as the arbitrator "sufficiently identifies the *specific circumstances* under which employees are entitled to backpay."[113] Similar to *DHS IV*,[114] the Arbitrator found that, as a result of the Agency's unlawful scheduling deviations, unit employees are entitled to backpay.[115] And, similar to *DHS III*,[116] he narrowly identified the specific circumstances under which unit employees are entitled to backpay: unit-employee schedules: (1) must have deviated from § 6101's scheduling requirements between April 17, 2008, and August 1, 2011; (2) were not deviated at the unit employee's request; and (3) were not modified to allow the unit employee to attend court hearings.[117]

Other than relying on arguments that the Authority rejected in *DHS III* and *DHS IV*, the Agency does not provide additional support for its claim that the Meredith-award formulae are contrary to the BPA. Accordingly, for the same reasons discussed in *DHS III* and *DHS IV*, we find that the award is not contrary to the BPA, and we deny the Agency's exception.[118]

5. The award is not contrary to the COPRA or the ADA.

The Agency's sixth contrary-to-law exception argues that the award is contrary to the COPRA and the ADA because it compensates unit employees: (1) for work that was not actually assigned or performed on Sundays, holidays, or at night; and (2) in excess of a statutory cap on overtime earnings.[119]

In pertinent part, the COPRA provides overtime compensation to employees who are "officially assigned to perform work in excess of [forty] hours in the administrative workweek."[120] And it includes a provision that limits the "aggregate of overtime pay . . . and premium pay . . . that a customs officer may be paid in any fiscal year."[121] However, Authority precedent recognizes that, under the Agency's own COPRA-implementing regulations, compensation may be awarded under the COPRA "for work not performed, . . . includ[ing] . . . awards made in accordance with [backpay] settlements."[122] Further, Authority precedent holds that the COPRA earnings cap does not apply to "awards made in accordance with back[pay] settlements," such as the award in this case.[123]

Consequently, we reject the Agency's claim that the award is contrary to the COPRA. Similarly, because the Agency's claim that the award violates the ADA is premised on a finding that the award violates the COPRA, we also reject that claim. Accordingly, we deny this contrary-to-law exception.

C. The award is not incomplete, ambiguous, or contradictory so as to make implementation impossible.

The Agency, in referencing its exceptions to the Meredith award in *DHS III*, claims that the award is "circular, incomplete, and ambiguous[,] and make[s] implementation [of the award] impossible."[124] The Agency identifies two ambiguities: (1) what constitutes a unit employee's "basic [workweek]"; and (2) "how the hours are to be calculated."[125] However, the Agency does not explain how these alleged ambiguities make the award incomplete, ambiguous, or contradictory so that implementation of the award is impossible.

The award is clear. First, regarding the basic workweek, the Arbitrator explicitly used § 6101 as a benchmark.[126] Section 6101 requires, in pertinent part, a

[110] *DHS III*, 68 FLRA at 257.
[111] *DHS IV*, 68 FLRA at 527.
[112] *Id.*
[113] *DHS III*, 68 FLRA at 257 (emphasis added) (citing *IAMAW, Lodge 2261 & AFGE, Local 2185*, 47 FLRA 427, 434-35 (1993)); *see also Fed. Emp. Metal Trades Council, Local 831*, 39 FLRA 1456, 1459 (1991).
[114] *DHS IV*, 68 FLRA at 527.
[115] Award at 74.
[116] *DHS III*, 68 FLRA at 257.
[117] Award at 74-75.
[118] *DHS IV*, 68 FLRA at 527; *DHS III*, 68 FLRA at 257.
[119] Exceptions Br. at 26-30.
[120] 19 U.S.C. § 267(a)(1).
[121] *Id.* § 267(c)(1).
[122] *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999) (*Treasury*) (quoting 19 C.F.R. § 24.16(h)) (internal quotation marks omitted); *see DHS IV*, 68 FLRA at 529; *DHS II*, 68 FLRA at 162-63.
[123] *DHS II*, 68 FLRA at 162-63 (alteration in original) (citing *Treasury*, 55 FLRA at 560).
[124] Exceptions Br. at 31.
[125] *Id.*
[126] Award at 78-79.

standardized forty-hour workweek.[127] Second, regarding calculating hours for backpay purposes, the Authority found that the Meredith award's formulae sufficiently identify the specific circumstances under which unit employees are entitled to backpay.[128] Because the Agency fails to provide additional argument why the award at issue here is impossible to implement, we deny the Agency's exception.

D. The award does not violate law or public policy by awarding punitive damages against the federal government.

The Agency argues that the award violates law and public policy because it awards punitive damages against the federal government.[129] Specifically, the Agency submits that awarding punitive damages against the federal government is not authorized by law and violates public policy.[130] However, the Authority has previously rejected the contention that a backpay award that complies with the BPA is an impermissible assessment of punitive damages against the federal government.[131] Consistent with that precedent, and given our determination that the award complies with the BPA, we reject the Agency's contention that the award provides for punitive damages contrary to law and public policy.

Accordingly, we deny this exception.

In denying the Agency's exceptions, we reject the dissent's claim that the Arbitrator was "collaterally estopped from . . . ruling on [the] issues" in this case by a prior arbitrator's award.[132] Apart from other considerations, the Agency does not make a collateral estoppel argument in this case.

V. Decision

We deny the Agency's exceptions.

[127] 5 U.S.C. § 6101(a)(2)(A).
[128] *DHS III*, 68 FLRA at 257.
[129] Exceptions Br. at 35-36.
[130] *Id.*
[131] *DHS II*, 68 FLRA at 165 (citing *U.S. DOD, Def. Depot Memphis, Memphis, Tenn.*, 43 FLRA 228, 236-37 (1991).
[132] Dissent at 20.

Member Pizzella, dissenting:

I do not agree that the Agency's exceptions were timely filed.

For the second time this year, the majority decides that the procedural *requirements*, established by the Federal Service Labor-Management Relations Statute (the Statute)[1] and the Authority's Regulations, which establish the requirements for filing exceptions with the Authority, are not requirements after all, but are simply *suggestions* that may be considered, or ignored, by parties and arbitrators whenever those requirements prove to be inconvenient.[2]

The Statute and the Authority's Regulations[3] give parties thirty days to file exceptions to an arbitrator's award[4] "after the date of service of the award."[5] Practically speaking, arbitrators frequently serve their awards by more than one method of service often by electronic mail (email) or facsimile and then followed by some form of hard-copy mail service.

This reality was noted in the new Regulations the Authority published in 2010. The 2010 amendments specify that:

> If the award is served by more than one method, then *the first method* of service *is controlling* when determining the date of service for purposes of calculating *the time limits for filing exceptions*.[6]

Here, Arbitrator James W. Mastriani sent his award to the parties by email on July 16, 2014, followed by overnight FedEx delivery.[7] The Agency filed its exceptions on August 18, 2014, thirty-three days after the Arbitrator sent the parties an email with his award attached.[8] NTEU argues that the Agency's exceptions are filed three days too late and are therefore untimely.

On this point, I agree with NTEU.

Under § 2425.2(c)(5) of the Authority's Regulations, the Agency's exceptions had to be filed with the Authority no later than August 15, 2014, thirty days

[1] 5 U.S.C. §§ 7101-7135.
[2] *See U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 68 FLRA 231, 236 (2015) (*VAMC Richmond*) (Dissenting Opinion of Member Pizzella).
[3] 5 C.F.R. §§2400-2499.
[4] 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b).
[5] 5 C.F.R. § 2425.2(b).
[6] *Id.* § 2425.2(c)(5) (emphasis added).
[7] Majority at 6.
[8] Exceptions Form at 13.

after service of the Arbitrator's award, in order to be timely.

The majority, on the other hand, believes that, despite our Regulations, the Agency's exceptions are "timely" because *the Arbitrator unilaterally determined* that "*[o]fficial service* shall be [by] overnight [FedEx]."[9]

Unlike the majority, I would conclude that the Agency's exceptions are untimely.

I am no more willing, in this case, to cede that an arbitrator has the authority to determine when and how the jurisdictional requirements, which are clearly set out in our Statute and our Regulations, will apply than I was willing to cede that the Authority may simply ignore the Statute's thirty-day filing requirements in *U.S. Department of VA, Medical Center, Richmond, Virginia*.[10] As I noted in that case, the Authority's past precedent correctly held that timeliness is "jurisdictional."[11]

Arbitrators do not have the authority to establish filing deadlines that run counter to those established by the Statute. Without a doubt, Section 2425.2(c) of the Authority's Regulations provide that, if the parties have not agreed *on a method of service*, "then *the arbitrator may use* any commonly used method . . . and the arbitrator's selected method is controlling for purposes of calculating the time limit for filing exceptions."[12] That regulation, however, simply *permits* arbitrators to choose whether to serve the parties by electronic mail, commercial mail service, or both, but contrary to the assertions of the majority, it *does not permit* arbitrators *to determine the legal effect* of their chosen method of service.

The majority's decision today creates uncertainty where there was once a bright line. Consider the confusion that would ensue, for example, if the Arbitrator had written, in his email, "attached is a copy of the award, which I have served by FedEx," rather than "*[o]fficial* service shall be by overnight [FedEx]"?[13]

I would conclude, therefore, that the Agency's exceptions were untimely.

But because the majority addresses the merits of the Agency's exceptions, I disagree, for the same reasons that I discussed in *U.S. DHS, CBP* (*CBP, INS Officers*),[14] that an arbitrator may disregard an agency-head determination to "exempt [legacy employees] from the scheduling provisions of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.201,"[15] especially a determination that Attorney General Herbert Brownell exercised fifty-four years earlier, that eleven INS Commissioners and numerous federal courts recognized as a valid waiver, and that current INS Commissioner Basham then reapplied.[16]

What is also lost in the majority's analysis, however, is that the matter addressed by the majority today, for all intents and purposes, involves the same issues, matters, and parties that Arbitrator Robert Simmelkjaer addressed by in *CBP, INS Officers*. In that respect, it appears to me that Arbitrator Mastriani was collaterally estopped from any further ruling on those issues.

In *CBP, INS Officers*, Arbitrator Simmelkjaer found that, despite "the agency-head exemption"[17] issued by Attorney General Brownell and Commissioner Basham, CBP "violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) when scheduling the work of bargaining-unit employees," in an award dated June 25, 2013, from a grievance dated September 7, 2007, that NTEU filed through its Deputy Director of Negotiations, Kevin Fagan, following an arbitration hearing on February 20-21, 2013.[18] Similarly, in this case, Arbitrator Mastriani concluded that, despite the "Brownell [d]etermination" and the "Basham [m]emorandum,"[19] CBP "violate[d] 5 U.S.C. § 6101[(a)(3)] and 5 C.F.R. § 610.121 in . . . its scheduling practices," in an award dated July 16, 2014, from a grievance dated August 1, 2011, that NTEU filed through its Deputy Director of Negotiations, Kevin Fagan, following an arbitration hearing on May 16-17, 2013.[20]

Is it just me or does there seem to be a pattern here?

To make matters worse, Arbitrator Simmelkjaer was not even the first, and Arbitrator Mastriani likely will not be the last, arbitrator to address these same issues. Even Arbitrator Mastriani recognized the obvious collateral-estoppel implications of, and the "overlap"

[9] Majority at 6 (quoting Union Opp'n, Ex. C at 1) (emphasis added).
[10] 68 FLRA at 236 (Dissenting Opinion of Member Pizzella).
[11] *Id*. at 237.
[12] 5 C.F.R. § 2425.2(c) (emphasis added).
[13] Opp'n, Ex. C at 1.
[14] 68 FLRA 157, 166-169 (2015) (Dissenting Opinion of Member Pizzella) (emphasis omitted).
[15] *Id.* at 166 (emphasis omitted).
[16] *Id.*
[17] *Id.* at 158.
[18] Exceptions at 6-11 in *CBP, INS Officers*, 68 FLRA 157.
[19] Award at 23, 77.
[20] *Id.* at 1-2.

between the grievance before him and the grievance that Arbitrator Simmelkjaer addressed.[21] For that reason, Arbitrator Mastriani had to tip toe around the graveyard of prior awards issued by Arbitrators Gootnick, Meredith, and Goldstein in order to find something – anything – to rule on and to justify the need for a seventy-nine (that's right seventy-nine) page award,[22] which exceeded the number of pages in Arbitrator Simmelkjaer's previously-issued sixty-five page award.[23] Even though he admitted that "the prior arbitrations dealt *with similar or identical issues* to those in the instant case,"[24] Arbitrator Mastriani nonetheless found a gap that he could use to justify billing the parties for two days of hearing and a seventy-nine page award. According to him, the other awards did not "center on the time period that commended *after* the issuance of the April 17, 2008[,] Basham [m]emorandum."[25]

Something is very wrong with this picture. These ongoing grievances, over "similar or identical issues,"[26] do not further "positive working relationships and resolve good-faith disputes."[27] As I have noted before, grievances procedures should not be treated as "an all-you-can-eat smorgasbord."[28]

It is inexplicable to me that after the Simmelkjaer award in *CBP, INS Officers* − that CBP did not seek to resolve this grievance in accord with that decision, thereby averting the need for another arbitral determination; that NTEU would pursue multiple grievances before separate arbitrators and justify duplicative arbitration hearings, (within three months of each other) over "similar or identical issues";[29] and that Arbitrator Mastriani would not simply defer to the prior determinations made by Arbitrator Simmelkjaer in *CBP, INS Officers* after he identified the "similar[ities]" and "overlap" between that case and the grievance before him.[30]

In *U.S. Department of Commerce, Patent and Trademark Office*,[31] the majority ignored the warnings of then-Member Beck concerning the collateral-estoppel implications presented by that case. Member Beck noted, in dissent, that even though the agency did not use the specific term "collateral estoppel" in its arguments before the Authority, "the arbitral proceedings and the Agency's exceptions are rife with collateral[-]estoppel implicatons. Both parties and the Arbitrator recognized the implications of the Authority's prior decision, and the Agency addressed the impact of that decision throughout its exceptions."[32]

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit agreed with Member Beck and reversed the majority.[33] As the court observed, collateral estoppel can be applied when, as here: "(1) the same issue was involved in both cases";[34] here, acknowledged by Arbitrator Mastriani acknowledged the grievance involved "similar or identical issues";[35] "(2) that issue was litigated in the first case";[36] here, in three prior arbitrations;[37] "(3) resolving it was necessary to the decision in the first case; (4) the decision in the first case . . . was final";[38] the award in CBP, INS Officers issued on June 25, 2013,[39] and in this case on July 16, 2014;[40] and "(5) the party attempting to raise the issue in the second case was fully represented in the first case";[41] here, NTEU raised both grievances and was represented by its Deputy Director for Negotiations, Kevin Fagan.[13342]

In conclusion and as discussed above, I would conclude that the Agency's exceptions are not timely and should be dismissed on that basis alone. However, to the extent the majority entertains the exceptions, I must conclude that Arbitrator Mastriani's award is collaterally estopped by Arbitrator Simmelkjaer's earlier award.

Thank you.

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[21] *Id.* at 59.
[22] *Id.* at 79.
[23] Award at 65 *CBP, INS Officers*, 68 FLRA 157.
[24] Award at 59 (emphasis added).
[25] *Id.* (emphasis added).
[26] *Id.* at 59.
[27] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella).
[28] *AFGE, Local 919*, 68 FLRA 573, 578 (2015) (Dissenting Opinion of Member Pizzella).
[29] Award at 59.
[30] *Id.*
[31] 65 FLRA 290, 301 (2010) (Dissenting Opinion of Member Beck).
[32] *Id.* (citations omitted).
[33] *U.S. Dep't of Commerce, Patent and Trademark Office v. FLRA*, 672 F.3d 1095 (D.C. Cir. 2012) (*Commerce v. FLRA*).
[34] *Id.* at 100 (quoting *U.S. Dep't of Energy W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 11 (2000) (*Energy*)) (internal quotation marks omitted)).
[35] Award at 59.
[36] *Commerce v. FLRA*, 672 F.3d at 1100 (quoting *Energy*, 56 FLRA at 11) (internal quotation marks omitted).
[37] Award at 59.
[38] *Commerce v. FLRA*, 672 F.3d at 1100 (quoting *Energy*, 56 FLRA at 11) (internal quotation marks omitted).
[39] Exceptions at 6-11 in *CBP, INS Officers*, 68 FLRA 157.
[40] Award at 79.
[41] *Commerce v. FLRA*, 672 F.3d at 1100 (quoting *Energy*, 56 FLRA at 11) (internal quotation marks omitted).
[133] Exceptions at 6-11 in *CBP, INS Officers*, 68 FLRA 157; Award at 1-2.
[42]